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No. 430 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

IN THE MATTER OF THE PETITION OF
LOWELL M. BIRRELL

On Motion for Leave to File Petition For a Writ of Prohibition and Mandamus to the United States District Court for the Southern District of New York, the Honorable Sidney Sugarman, a Judge of the United States District Court for the Southern District of New York, and to the Judges and Officers of Said Court.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.
JOHN J. DEVANEY, JR.
(By appointment of Judge Sugarman),
225 Broadway
New York, N. Y.

THOMAS G. MEEKER,
General Counsel,
DAVID FERBER,
Assistant General Counsel,
Securities and Exchange Commission,
Washington 25, D. C.

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OPINION BELOW

There has been no reported opinion below. The oral remarks of the District Court in denying petitioner's motion to vacate the order that a warrant be issued and for the arrest of petitioner are set forth at Pet. 98-105.[1] There is apparently no transcript of the oral statement of the Court of Appeals for

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[1] "Pet. —" refers to the printed petition and to its appendix.

the Second Circuit (per Judge Medina) when that court denied relief similar to that which is here sought.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651.

STATUTE INVOLVED

18 U.S.C. 401, 62 Stat. 701, provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

QUESTION PRESENTED

Whether this Court should issue a writ of prohibition or mandamus to prevent continuance of a contempt proceeding based upon petitioner's failure to respond to subpoenas personally served upon him in a civil action subsequently terminated, where the contempt proceeding was specifically labeled a "criminal contempt" and was brought for the stated purpose of determining whether petitioner should "be adjudged in criminal contempt * * * and punished accordingly."

STATEMENT

The contempt proceeding in the United States District Court for the Southern District of New York, *United States of America* v. *Lowell M. Birrell*, Criminal Contempt No. CR 154-351, which is the subject of the extraordinary writ sought by petitioner, was instituted on October 11, 1957, by order to show cause why petitioner "should not be adjudged in criminal contempt * * * and punished accordingly," after petitioner had failed to respond to subpoenas personally served upon him in a pending civil action for injunction brought by the Securities and Exchange Commission.[2] (Pet. 109.) Judge Sugarman, who signed the order to show cause, had specifically stated that the proceeding was to be one for "criminal contempt under the last subdivision of Title 18, Section 401" and was to be "governed by Federal Rule of Criminal Procedure 42(b)" (Pet. 56), pursuant to which rule he had appointed an attorney of the Securities and Exchange Commission for the purpose of making the application (Pet. 59). In response to the suggestion that the proceeding be

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[2] *Securities and Exchange Commission* v. *Swan-Finch Oil Corporation, et al.*, Civil Action No. 119-230. Prior to the service of the subpoenas, petitioner, who was one of the defendants in that action, had consented to the entry of a final decree of permanent injunction against further sale of the securities of Swan-Finch Oil Corporation in violation of the registration provisions of the Securities Act of 1933 (Section 5, 48 Stat. 74, as amended, 15 U.S.C. 77e). However, the action had not yet been concluded as to certain of the defendants, and petitioner's testimony as a witness was desired in connection with those pending proceedings.

instituted by an order of arrest, Judge Sugarman had stated that petitioner (Pet. 57):

> "should be given the opportunity of coming in and making himself right with the Court.
>
> "However, then, if he ignores that, as he has ignored the subpoena, then I believe the Court in order to preserve its own dignity and authority would have no recourse but to issue a warrant for his arrest."

On November 1, 1957, the return date of the order to show cause, petitioner was not present in person. His counsel, who had been subpoenaed to be present that day, announced that he had just spoken with petitioner, who was in Havana, and stated (Pet. 76):

> "Mr. Birrell has asked me to state to the Court that as soon as he is advised by his doctor in Havana, and the doctor feels that he can come back here to New York, that he will be here to testify in this contempt proceeding and in these other proceedings."

After several adjournments, on November 20, 1957, a warrant was issued for the arrest of petitioner, who had not yet appeared in person (Pet. 126). Two days earlier, the injunction action in which the subpoenas had issued had been concluded.

On December 2, 1957, the District Court denied an application to vacate the order directing issuance of the warrant and to quash the warrant (Pet. 129). Petitioner then applied to the Court of Appeals for the Second Circuit for a writ of prohibition and mandamus. On December 9, 1957, the Court of Appeals denied the petition (Pet. 23). An application

for stay of the contempt proceeding, and of the enforcement and execution of the warrant for arrest pending final determination by this Court with respect to the petition for a writ was denied in the District Court on December 26, 1957. A similar application made in this Court was denied by Mr. Justice Douglas on January 3, 1958.

ARGUMENT

The petition for a writ of prohibition and mandamus is wholly without merit since (1) the District Court has proceeded properly and within its jurisdiction and (2) petitioner will have ample opportunity to correct any errors through normal appellate review.

1. In essence, petitioner's claim is that the proceeding against him is for civil contempt and hence, unlike a proceeding for criminal contempt, abated when the lawsuit in which the contempt occurred terminated. There is, however, no factual support for this contention that the proceeding is one in civil contempt. The contempt proceeding was instituted, as indicated above (p. 3), in conformity to the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure (Pet. 56, 59, 109-113) so that the District Court might "preserve its own dignity and authority" (Pet. 57); it was distinct from the civil action in which the subpoena had issued; it was brought in the name of the United States and from the outset was specifically labeled a "criminal contempt" (Pet. 65, 91, 109, 111, 114, 126); and, finally, the relief sought was that petitioner "be adjudged

in criminal contempt * * * and punished accordingly" (Pet. 110).

This case is in no respect comparable to *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, relied upon by petitioner, where, as this Court noted (at 445), "the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original cause in equity." The opinion pointed out that the title of the action "is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority" (at 446). The quotation from the *Gompers* case at page 33 of the petition is inaccurate. It fails to indicate that the last sentence before the asterisks is incomplete. With emphasis added to indicate the material omitted by the petitioner, that sentence reads (221 U.S. at 451):

> "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled—*of course without prejudice to the power and right of the court to punish for contempt by proper proceedings.*"

Petitioner also omits the next three sentences in the opinion, which emphasize the distinction between that case and this (*id.* at 451-452):

> "If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public

on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

"But, as we have shown, this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character."

Although he does not spell it out explicitly, petitioner appears to argue that the determination whether a contempt is civil or criminal is necessarily dependent upon the nature of the act and that disobedience to a subpœna, being a refusal to do an affirmative act, can constitute only civil contempt (Pet. 27, 38). That this is not the law was reiterated in *Yates* v. *United States*, 355 U.S. 66, where both the majority and dissenting opinions were predicated on the proposition that a refusal to testify could be the basis for either civil or criminal contempt. This is also in full accord with the *Gompers* case—which emphasized (221 U.S. at 448) that the relief sought is "controlling" and "determinative"—as well as with other cases relied upon by petitioner.[3] In-

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[3] See, *e.g.*, "it is the nature of the relief asked that is determinative of the proceeding." *Penfield* v. *Securities and Exchange Commission*, 330 U.S. 585, 590, citing *Lamb* v. *Cramer*, 285 U.S. 217, 220.

deed, this Court has held: "The same acts may justify a court in resorting to coercive and to punitive measures."[4] None of the cases cited by petitioner supports the proposition that a proceeding properly instituted as a criminal contempt must be treated as a civil contempt.

2. Should petitioner be held in criminal contempt, he will of course have a right to appellate review in the normal course,[5] and issuance of an extraordinary writ is unnecessary for his protection. He will be entitled to raise on appeal any issue which he preserves, including the present claim that the proceeding against him is not, and cannot be, a criminal contempt proceeding. As noted in *Ex parte Fahey*, 332 U.S. 258, 260, these writs, as "extraordinary remedies, * * * are reserved for really extraordinary causes" and are not to be utilized as "substitutes for appeals." The cases cited in the petition (Pet. 45-46) in which this Court has issued such writs do not include any involving contempt proceedings nor situations comparable to the situation here.

The possibility that petitioner's passport facilities might be withdrawn to aid in his arrest creates no exceptional circumstance justifying issuance of the writ. Petitioner's contention on this score (Pet. 46-47) involves an unwarranted assumption that public officials will fail to accord him proper process in a proceeding that might be brought in the future and

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[4] *United States* v. *United Mine Workers of America*, 330 U.S. 258, 299.

[5] 62 Stat. 929, as amended, 28 U.S.C. 1291.

ignores his right to obtain court review should that occur. Cf. *Perkins* v. *Elg*, 307 U.S. 325; *Dulles* v. *Nathan*, 225 F. 2d 29, 30 (C.A.D.C.); *Schachtman* v. *Dulles*, 225 F. 2d 938 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of prohibition and a writ of mandamus should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JOHN J. DEVANEY, JR.
(By appointment of Judge Sugarman).

THOMAS G. MEEKER,
General Counsel,

DAVID FERBER,
Assistant General Counsel,
Securities and Exchange Commission.

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